

Martin A. Little, Nevada Bar No. 7067
 Robert L. Rosenthal, Nevada Bar No. 6476
 Robert Hernquist, Nevada Bar No. 10616
 HOWARD & HOWARD ATTORNEYS PLLC
 3800 Howard Hughes Parkway, Suite 1000
 Las Vegas, Nevada 89169
 Telephone: (702) 257-1483
 Email: rlr@h2law.com
 Email: mal@h2law.com
 Email: rwh@h2law.com

Attorneys for Defendant M.J. Dean Construction, Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PARNELL COLVIN,
 Plaintiff,

vs.

M.J. DEAN CONSTRUCTION, INC.,
 Defendant.

Case No. 2:20-cv-01765-APG-EJY

DEFENDANT’S TRIAL BRIEF

Defendant M.J. Dean Construction, Inc. (“Defendant” or “MJ Dean”), by and through its attorneys of record, the law firm of Howard & Howard Attorneys PLLC, hereby submits Defendant’s Trial Brief in connection with the upcoming trial.

I.
INTRODUCTION AND PROCEDURAL BACKGROUND

This is an employment discrimination case, where Plaintiff, Parnell Colvin, who is African American, is suing his former employer, Defendant, M.J. Dean Construction, Inc. ("Dean"). Plaintiff’s claims arise out of racism he allegedly experienced while working for Defendant as a laborer on the Madison Square Garden Sphere project (the "Sphere Project"), and Defendant's subsequent termination of his employment. Plaintiff's First Amended Complaint alleges the following causes of action against Defendant:

1. Retaliation. Plaintiff claims that Defendant terminated his employment in retaliation for complaining that his General Foreman, Kevin Gutierrez ("Gutierrez"), had discriminated and/or harassed him on the basis of his race approximately five months earlier.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

3
4
5
6

7
8
9
10
11
12
13
14
15
16

17
18
19
20

21
2223
24
25
26
27

1 therefore, in order to prevent himself from getting fired, Colvin immediately submitted an internal
2 complaint alleging that Gutierrez had just called him the N-word, assigned him degrading tasks
3 that non-African Americans did not have to perform, and did provide him with overtime
4 opportunities were provided to non-African American employees.

5 MJ Dean's witnesses will testify that, upon receiving Plaintiff's complaint, it immediately
6 conducted an internal investigation. Gutierrez will testify that, (1) he never called Colvin the N-
7 word; (2) he never assigned Colvin and other African Americans degrading tasks due to their race;
8 (3) Colvin never asked to be assigned overtime (and Colvin's payroll records reflect that he
9 worked overtime shortly after he started at MJ Dean). MJ Dean ultimately found that there were
10 no witnesses who could corroborate Colvin's story. MJ Dean's witnesses will testify that later in
11 the day on November 14, 2019, Colvin chose to be transferred to the yard at the Sphere Project
12 under the supervision of Dave Muti. Colvin admitted that he did not work directly with Gutierrez
13 or have any complaints or concerns regarding Gutierrez for the rest of his employment.

14 Colvin will likely testify that, on December 24, 2019 and January 3, 2020 (a little over one
15 month later he filed his internal complaint), he observed offensive graffiti in two portable
16 restrooms on the jobsite and reported it on each occasion to MJ Dean's safety personnel. Colvin
17 admitted in his deposition that the graffiti was removed from one of the restrooms and that he was
18 not sure if it was removed from the other. MJ Dean's witnesses will testify that Colvin never
19 complained about graffiti at any time.

20 In early April 2020, MJ Dean was directed to shut down all of its work by April 15, 2020,
21 due to the developing COVID-19 pandemic. Dean then proceeded to lay off more than 500
22 employees during the next two weeks. Colvin was among those laid off, and was let go on April
23 6, 2020. Although Gutierrez prepared Colvin's termination paperwork and physically handed
24 Colvin the termination notice on April 6, 2020, Gutierrez did not decide who to lay off and did
25 not have any input in the process. All decisions regarding layoffs, including Colvin's, were made
26 by Superintendent John Thomason. A few weeks later, MJ Dean rehired about 200 of the
27 employees who had been laid off, but Colvin was not included. The decision about who to rehire
28 was left to MJ Dean's four superintendents. Once again, Gutierrez did not decide or have any

1 input regarding who to rehire.

2 Based on the foregoing, MJ Dean will argue that (1) Plaintiff was never subjected to a
3 hostile work environment; (2) Gutierrez never discriminated against or harassed Plaintiff; and (3)
4 Plaintiff's layoff was completely unrelated to him filing an internal complaint about 5 months
5 earlier; rather it solely due to MJ Dean being ordered to shut down the jobsite because of the
6 pandemic.

7
8 **III.**
LEGAL ANALYSIS

9 **A. RACIAL DISCRIMINATION**

10 Under Title VII, establishing a claim of unlawful discrimination requires that Colvin show
11 that: "(1) he belongs to a protected class; (2) he was qualified for [his] position; (3) he was subject
12 to an adverse employment action; and (4) similarly situated individuals outside his protected class
13 were treated more favorably." *Chuang v. Univ. Cal. Davis Bd. Trs.*, 225 F.3d 1115, 1123 (9th Cir.
14 2000).

15 The evidence will demonstrate that Colvin was treated the same as all other similarly
16 situated employees and that he made up all of his claims in order to try to prevent Defendant from
17 firing him.

18 **B. RACIAL HARASSMENT**

19 Under Title VII, establishing a harassment claim requires Colvin to show "(1) that [he]
20 was subjected to verbal or physical conduct based on [his] race or national origin; (2) that the
21 conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the
22 conditions of [his] employment and create an abusive work environment." *Galdamez v. Potter*,
23 415 F.3d 1015, 1023 (9th Cir. 2005) (simplified). Conduct is sufficiently severe and pervasive to
24 alter the conditions of employment if it "pollutes the victim's workplace, making it more difficult
25 for [him] to do [his] job, take pride in [his] work, and to desire to stay on in [his] position."
26 *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1113 (9th Cir. 2004) (simplified). To satisfy the
27 third element, Colvin "must [also] show that [his] work environment was both subjectively and
28 objectively hostile." *Galdamez*, 415 F.3d at 1023. Analyzing objective hostility requires

consideration of the totality of the circumstances, and “must be considered from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.” *Id.* (simplified).

Defendant will demonstrate that Plaintiff cannot satisfy the necessary elements to this claim because the alleged harassing conduct did not occur, and even if it did, it was not sufficiently severe or pervasive enough to alter the terms and conditions of Plaintiff’s employment.

C. RETALIATION

Under Title VII, establishing a claim of retaliation requires that Colvin “show that he engaged in a protected activity, [that] he was subsequently subjected to an adverse employment action, and that a causal link exists between the two.” *Dawson v. Entek Int’l*, 630 F.3d 928, 936 (9th Cir. 2011). The causal link element “can be inferred from circumstantial evidence such as the employer’s knowledge of the protected activit[y] and the proximity in time between the protected activity and the adverse action.” *Id.* Once a plaintiff establishes a prima facie case, “the burden shifts to the defendant employer to offer evidence that the challenged action was taken for legitimate, non-discriminatory reasons.” *Id.* If the employer provides a legitimate explanation, the burden shifts back to the plaintiff to “show that the [employer’s] explanation is merely a pretext.” *Id.*

In this case, Plaintiff cannot demonstrate that his layoff occurred because he complained about Gutierrez almost five months earlier. Instead, the evidence will show that Plaintiff, along with over 500 other MJ Dean employees were all ordered by the owner of the Sphere Project, MSG Entertainment, to be laid off in within the first two weeks of April 2020, due to the COVID-19 pandemic. Furthermore, Defendant will prove that Gutierrez did not decide or have any input into who was laid off.

D. NEGLIGENT TRAINING AND SUPERVISION

To establish a claim of negligent training and supervision under Nevada law, Colvin must show: “(1) the employer knew that the employee acted in a negligent manner, (2) the employer failed to train or supervise the employee adequately, and (3) the employer’s negligence proximately caused the plaintiff’s injuries.” *Helle v. Home Health Servs. of Nev.*, No. 48427, 2008 WL 6101984, at *3 (Nev. 2008) (citing *Hall v. SFF, Inc.*, 930 P.2d 94, 98 (Nev. 1996)); *Oehler*

1 *v. Humana, Inc.*, 775 P.3d 1271, 1272 (Nev. 1989)).

2 The evidence will demonstrate that, (1) Plaintiff and all other relevant MJ Dean employees
 3 received discrimination and harassment training; (2) Plaintiff was aware of MJ Dean's
 4 discrimination, harassment and complaint procedures and unreasonably failed to use them; (3)
 5 Plaintiff knew he could always complain to his Union and failed to do so; (4) Plaintiff never
 6 complained about racist graffiti in the restrooms—or anywhere else; (5) AECOM Hunt, not MJ
 7 Dean, was not responsible for the restrooms at the Sphere Project and for removing any graffiti;
 8 (6) all subcontractors had access to the restrooms at the Sphere Project; and (7) at all relevant
 9 times, MJ Dean's safety personnel promptly reported any graffiti to AECOM Hunt.

10 **E. DAMAGES**

11 Plaintiff has never provided a computation of damages that complies with legal
 12 requirements.

13 **IV.**
CONCLUSION

14 Once the evidence has been presented, Plaintiff will be unable to satisfy the elements of
 15 his claims. Whether from the jury or this Court, a complete defense verdict will be the only
 16 reasonable result.

17 Dated: March 21, 2023

Respectfully submitted,

18 HOWARD & HOWARD ATTORNEYS PLLC

19 By: /s/ Robert Rosenthal
 20 Robert Rosenthal, Esq.
 21 Martin A. Little, Esq.
 22 3800 Howard Hughes Parkway, Suite 1000
 23 Las Vegas, Nevada 89169
 24 Attorneys for Defendant M.J. Dean
 25 Construction, Inc.
 26
 27
 28

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been electronically filed and served upon the following parties on March 21, 2023 through the Court's ECF system.

LAW OFFICES OF MICHAEL P. BALABAN

Michael P. Balaban, Esq.

10726 Del Rudini Street

Las Vegas, NV 89141

Attorneys for Plaintiff

/s/ Barbara Dunn

Howard & Howard Attorneys PLLC